Filed 6/17/15 Governing Bd. of Long Beach Unified School Dist. v. Commission on Professional Competence CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GOVERNING BOARD OF LONG BEACH UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, v. COMMISSION ON PROFESSIONAL COMPETENCE BY AND THROUGH THE OFFICE OF ADMINISTRATIVE HEARINGS, Defendant and Respondent. _____ JAMES KELLEY, Real Party in Interest and Appellant.	B263703 (Los Angeles County Super. Ct. No. NC059306)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed in part and reversed in part.

Atkinson, Andelson, Loya, Ruud & Romo, Anthony P. De Marco and Heather A. Dozier for Plaintiff and Respondent.

Alicia Germaine Boomer for Defendant and Respondent.

Trygstad, Schwab & Trygstad, Richard Joseph Schwab and Lawrence B. Trygstad for Real Party in Interest and Appellant.

Plaintiff/respondent Governing Board of Long Beach Unified School District (District) brought the present proceeding to terminate the employment of real party in interest/appellant James Kelley, a District teacher. The matter was heard by the defendant/respondent Commission on Professional Competence (Commission), which found that some of the incidents with which Kelley had been charged were substantiated, but determined that the District had not established sufficient grounds to terminate him.

The District filed a petition for writ of administrative mandate (Code Civ. Proc. § 1094.5). The superior court granted the petition, finding that the District had established additional incidents of misconduct and that Kelley had engaged in clear unprofessional conduct. The court remanded the case to the Commission to be reconsidered in light of its findings. Kelley appealed.

On appeal, Kelley urges that three of the additional incidents found substantiated by the superior court were not supported by substantial evidence. We agree only as to one, and otherwise affirm the judgment granting the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background

Kelley has been a teacher with the District since 1982. From 1995 to 2012, he taught computer applications, electronics, computer diagnostics, graphic design, and printmaking at Wilson High School in Long Beach.

In May 2012, the District served a statement of charges, superseded by a first amended statement of charges (statement of charges). It alleged that cause existed to dismiss Kelley from his employment for unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of or refusal to obey school laws and regulations. The statement of charges identified 33 specific incidents in which Kelley was alleged to have dealt inappropriately with students, parents, or school administration.

Kelley requested a hearing on the charges. An administrative hearing was held by the Commission on March 11-15 and 18-21, and September 18-20 and 24, 2013. In

December 2013, the Commission issued a decision in which it found that Kelley had engaged in eight acts of unprofessional conduct, as follows:

(1) "The District alleged (¶ 11) and established that on January 25, 2010, [Kelley] threw a skateboard belonging to student G.P. out of the classroom door. The evidence further established that [Kelley] threw the skateboard only a short distance into a raised planter, and that he did not damage the skateboard or the planter or cause any injury to person or property."

(2) "The District alleged (¶ 16) and established that, on October 21, 2011, [Kelley] made students uncomfortable by taking photographs of them at lunchtime without permission. The group of students was eating lunch outside; there was litter on the ground around them. Rather than ask for the students' names, [Kelley] took photographs of the students, telling them that he would 'send the pictures in' if they did not pick up the trash in the area."

(3) "The District alleged (¶ 20) and established that, on December 1, 2011, [Kelley] responded to Principal of Instruction Gonzalo Moraga's e-mail request to meet regarding parent complaints with, 'Does this crap ever end?' "

(4) "The District alleged (¶ 21) and established that, on December 9, 2011, [Kelley] told a parent during a meeting to discuss a student's grade that he did not want to continue to hold the meeting while Moraga was present."

(5) "The District alleged (¶ 23) and established that, on March 12, 2012, [Kelley] refused to follow a verbal directive from Moraga. Moraga called [Kelley's] classroom and directed [Kelley] to allow student S.B., whom [Kelley] had sent to Moraga's office, back into the classroom with his baseball bat and equipment bag. [Kelley] refused, saying he would take a sick day instead. Moraga kept the baseball equipment in his office, and student S.B. returned to [Kelley's] classroom. Two days later, on March 14, 2013, Moraga met with [Kelley] and directed him not to confiscate sports equipment from students, send students out of his classroom for carrying sports equipment, or discipline students for carrying sports equipment into his class."

(6) "The District alleged and established that, on April 2, 2012, [Kelley] submitted lesson plans to Mr. Moraga with an inappropriate statement regarding his recent administrative leave. Although the lesson plans were shown only to Moraga, not to the students, [Kelley's] written comment about his 'foolish suspension' was inappropriate.

(7) "The District alleged (¶ 12) and established that [Kelley] used inappropriate force by grabbing the leg of a stool, which caused student A.M., who was perched on the stool, to fall on the floor and hit his head on the desk. More specifically, on December 13, 2010, during [Kelley's] fourth period class, [Kelley] noticed that A.M. had his head down on his desk and appeared to be sleeping. [Kelley] approached A.M., who was, in fact, asleep, and woke him by rapping on the desk with his hand. A.M. raised his head, but again put his head down to go to sleep. [Kelley] told A.M. to stand up, touching A.M.'s shirt as A.M. rose. [Kelley] directed A.M. to stand near the wall. A.M. did so, but then took a stool and sat on it. When [Kelley] observed that A.M. was no longer standing, [Kelley] approached A.M. and said that he had told A.M. to stand. [Kelley] grabbed two of the stool legs, causing A.M. to lose his balance and fall. [Kelley] testified that he did not pull the stool legs until he thought A.M. was standing up, and that he did not intend to cause A.M. to fall. The District did not establish the contrary—A.M. and other students testified about the incident but disagreed on so many important particulars concerning the event that they were not sufficiently credible to demonstrate any improper intent on [Kelley's] part."

(8) "The District alleged (¶ 30) and established that, during the 2011-2012 school year, [Kelley] told student J.R. that the work he had done on an assignment was 'crap.' The District alleged but did not establish that [Kelley] intimidated and belittled students in his classes."

Although the Commission found these incidents substantiated, it concluded that Kelley's conduct did not rise to the level of unsatisfactory performance, evident unfitness for service, or persistent violations of school laws or regulations. The Commission

unanimously agreed that Kelley was not unfit to teach and that his dismissal was unwarranted.

II.

Administrative Mandate Proceeding

The District filed a petition for writ of administrative mandate on January 17, 2014. The petition asserted that the Commission's decision was invalid under Code of Civil Procedure section 1094.5 because the Commission improperly excluded evidence and committed a prejudicial abuse of discretion in that it failed to proceed as required by law, its decision was not supported by its findings or existing law, and its findings were not supported by the law or weight of the evidence.

The superior court heard oral argument on the petition and then took the matter under submission for a review of the administrative record. The court issued a decision granting the petition for writ of mandate on February 6, 2015. The court found that the District established seven additional incidents that the Commission had found unsubstantiated either in whole or in part. Of those seven incidents, three are relevant to the present appeal:

(1) *Student uniform violation incident:* As to this incident, the Commission found: "The District alleged (¶ 14) but did not establish that, on October 10, 2011, [Kelley] responded inappropriately to a student's uniform violation. [Kelley] noticed that student J.M. was wearing his pants low, in violation of school policy. [Kelley] directed student J.M. outside, in order to address the issue without embarrassing the student. [Kelley] told student J.M. that he was not behaving at his grade level, not an improper derogatory comment, and had student J.M. tuck in his shirt, as the student was not wearing a belt and his pants kept slipping down. The District offered no testimony other than student J.M.'s, which was insufficient to establish that [Kelley] did anything inappropriate in enforcing the school dress code."

The court found this incident should have been found to have been established: "Mr. Kelley made the student go outside and after 10-20 minutes he lifted up the student's shirt and told him to pull up his pants. He then made the student, who did not

have a belt so his pants kept falling down, tuck in his shirt. There is no evidence that it is against school rules to leave a shirt untucked. The [Commission] said that the District offered no testimony other than the student's, which was found to be insufficient to establish that [Kelley] did anything inappropriate in enforcing the school dress code. Just because no one else was present to testify about something happening does not mean that it did not happen. The Court believes the student over Mr. Kelley—the student did not have a reason to lie. The student was embarrassed about this incident. The Court does not think he would make something like this up. [AR 996] Mr. Kelley's version of the incident is not logical. The student was consistent with the note he wrote and with his original complaint and with his testimony. [AR 2762]"

(2) *Skateboard incident:* The Commission found: "The District alleged (¶ 15) but did not establish that, on October 17, 2011, [Kelley] treated a student with disrespect by failing to return the student's property in a timely manner. [Kelley] confiscated a skateboard from student B.L. during the lunch period, in accordance with the school's skateboard policy; [Kelley's] uncontroverted testimony was that he saw a friend of student B.L.'s waving the skateboard in the air and slamming it down on a concrete planter. [Kelley] told B.L. he could retrieve the skateboard after school from school administration. [Kelley] stored the skateboard in his classroom until the end of the school day, when he attempted to turn it over to school administration. The administrators were in a meeting after school, so [Kelley] stored the skateboard in his classroom overnight, rather than immediately turning the skateboard over to student B.L., as the student requested. The skateboard was returned to the student the next morning, within 24 hours of its confiscation, all in accordance with school policy."

The court found this incident should have been found to have been established: "The [Commission] said that this incident was not established. This incident makes it clear that Mr. Kelley does not like skateboards, and there is testimony from the student and two independent witnesses that Mr. Kelley took the skateboard from the student at lunch. Mr. Kelley did not follow the proper procedures because he did not give the skateboard to the administrator and instead kept it until the next morning. There was

enough to establish that this happened. Since the student and the two independent witnesses had almost identical versions, the Court believes the students. This incident should have been established. [AR 998-1002]"

(3) *Participation category incident:* The Commission found: "The District alleged (¶ 42) but did not establish that, during the 2011-2012 school year, [Kelley] added a 'participation' category into student grades for the purpose of punishing students. The evidence did not show that the category was intended to punish or did, in fact, constitute punishment."

The court said this incident should have been found established: "The [Commission] said that this was not established. Mr. Kelley's classroom syllabus does not have a participation category. This category acted to punish students by taking away points, although they could make up those points that were taken away. [AR 2796-2797] [AR2875] The Court finds that it was established."

In summary, the court said that of the 32 incidents charged by the Board, 13 had been substantiated, demonstrating "clear unprofessional conduct" when "taken as a whole." The court thus ordered the Commission's decision to be set aside "and remand[ed] the matter to be reconsidered in light of this Court's decision."

The superior court issued a peremptory writ of mandate and judgment thereon on March 17, 2015. Kelley timely appealed.

DISCUSSION

Kelley's appeal is limited to the superior court's findings as to three incidents: (1) the uniform violation incident, (2) the skateboard incident, and (3) the participation category incident. Kelley contends that none of these incidents is supported by substantial evidence. As we now discuss, we find the superior court's findings as to the uniform violation and skateboard incidents supported by substantial evidence, and the court's finding as to the participation category incident unsupported by substantial evidence. We affirm the court's order of remand to the Commission for further findings.

I.

Standard of Review

" 'Judicial review of most public agency decisions is obtained by a proceeding for a writ of ordinary [Code of Civil Procedure section 1085] or administrative [Code of Civil Procedure section 1094.5] mandate. [Citations.] The applicable type of mandate is determined by the nature of the administrative action or decision. [Citation.]' [Citation.] Typically, quasi-legislative or ministerial acts are reviewed by ordinary mandate, and quasi-judicial acts are reviewed by administrative mandate. [Citation.]" (*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1196.)

Judicial review of decisions of the Commission are governed by the administrative mandate process set forth in section 1094.5 of the Code of Civil Procedure. In reviewing such decisions, " 'the superior court exercises its independent judgment, i.e., it reconsiders the evidence presented at the administrative hearing and makes its own independent findings of fact.' [Citations.] In doing so, however, the court ' "must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." ' (*LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 940 (*LaGrone*); see also *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1461.)

"Put another way, while the presumption of correctness is 'the starting point for the trial court's review,' as a presumption it is rebuttable and may be overcome by the evidence. (*Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077.) Thus, when applying the independent judgment test, the trial court may reweigh the evidence and substitute its own findings for those of the agency, after first giving 'due respect' to the agency's findings. (*Ibid*.) In the end, when ruling on an application for a writ of mandate, 'the trial court uses its independent judgment to determine whether the weight of the evidence supports the administrative decision.' (*LaGrone, supra*, 202 Cal.App.4th at p. 940; see Code Civ. Proc., § 1094.5, subd. (c) ['in cases in which the court is authorized by law to exercise its independent judgment on the evidence,

abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence'].)" (*Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 752-754.)

" ' "After the superior court makes an independent judgment upon the record of an administrative proceeding, [the] scope of review on appeal is limited." [Citation.] We must sustain the trial court's findings if they are supported by substantial evidence. [Citation.] In reviewing the evidence, we resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the judgment. " ' "When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court." ' " ' [Citations.] 'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. [Citation.] It is sufficient ' "if any reasonable trier of fact could have considered it reasonable, credible and of solid value." ' [Citation.] [¶] 'If there is substantial evidence, the judgment must be affirmed. [Citation.] We do not reweigh the evidence. Our inquiry "begins and ends with the determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support the finding of fact." ' [Citation.]" (*San Diego Unified School District v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1141-1142.)

II.

Uniform Violation Incident

The statement of charges alleged: "On or about October 10, 2011, you [Kelley] responded inappropriately to a student's uniform violation. According to the written statement of District student J.M., you directed him outside. Ten minutes later, when you came to talk to him, you told him, 'look where your pants are,' and you lifted up his shirt. After J.M. lifted up his pants, you told J.M. he had his underpants and gut hanging out. You also commented you thought J.M. was in the ninth grade, and you could not believe he was in the eleventh grade and 'acting this stupid.' There were other people outside at the time. J.M. reported being embarrassed by your conduct."

The trial court concluded that the District established this allegation, a conclusion we find supported by substantial evidence.

Kelley testified that on the day at issue he noticed J.M.'s pants were down below his buttocks. He did not want to embarrass J.M. in front of the class so he asked him to step outside. Kelley then finished taking attendance and went outside to talk to J.M. He asked J.M. to pull up his pants, but J.M. did not want to. Kelley said, " '[Y]ou're in 11th grade. You know the rules for the dress code. You have been here three years, so I shouldn't have to explain it to you. You can't be in class like that. It's offensive to a lot of people. It's offensive to the ladies in the class and everybody else. You need to pull your pants up to your hip. We don't need to see your underwear hanging out.' " Kelley said he did not touch J.M.'s clothing or his body. Kelley then gave J.M. a choice: "I said, 'J., you can fix your pants, come back into class, or I'll send you out and give you a referral [to administration] because you refuse to do it.' And he said, 'Give me the referral.' "

J.M.'s testimony about the incident differed in significant respects from Kelley's. J.M. testified that while in class, his pants were lower than permitted by the dress code. Kelley asked J.M. to step outside, which J.M. did. After waiting for 10 to 20 minutes, J.M. knocked on the door, and Kelley said, "Wait outside and I'll be out there to talk to you." About 15 minutes later, Kelley came outside and said J.M.'s pants were too low and to pull them up. J.M. testified that, "I pulled them up and he said that wasn't good enough, and then I told him, 'This is as high as they will go.' And then he lifted up my shirt and said, 'You look at where your pants are. They're too low. You got your gut hanging out and everything.' And he said, 'Now since you didn't pull your pants up, you have to tuck your shirt in.' I said I wasn't going to tuck my shirt in and he sent me to the principal's office." J.M. said once he pulled up his pants, they were at his waist. He believed they stayed at his waist, although "I didn't have a belt so they might have slouched down as the day went on." When Kelley pulled up J.M.'s shirt, about half his abdomen was exposed. J.M. said he felt "embarrassed and mad because people were walking by at the moment." Kelley asked what grade J.M. was in; when J.M. responded

that he was in eleventh grade, Kelley said " 'You're in the 11th grade and you're acting this stupid.' "

On appeal, Kelley asserts that the allegation of inappropriate discipline should not have been found substantiated because J.M. "admitted during his examination that his pants were . . . at his buttocks." We do not agree. While J.M. admitted that "my pants were a little bit too low," he did not say they were "at his buttocks." The testimony to which Kelley cites to establish that J.M.'s pants were below his buttocks is Kelley's own. In any event, the issue is not whether J.M. violated the dress code—J.M. admitted that he did—but whether Kelley's response to the dress code violation was appropriate. As to that issue, there was substantial evidence (J.M.'s testimony) that Kelley's response was *not* appropriate because Kelley required J.M. to wait outside the classroom for 25 to 35 minutes before addressing his violation of the dress code, pulled up J.M.'s shirt, exposing his abdomen, and told J.M. he was acting "stupid."

Kelley contends that J.M.'s testimony is not substantial evidence because it is "at best vague and neither credible nor competent." We do not agree. Our review of the record suggests no obvious lack of credibility; in any event, "[t]he testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible.' [Citation.]" (*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2012) 209 Cal.App.4th 445, 458.) The trial court found J.M.'s testimony credible, a finding to which we must defer. We decline Kelley's invitation to make credibility determinations on appeal.

III.

Skateboard Incident

The statement of charges alleged: "On or about October 17, 2011, you treated District students with disrespect and failed to turn over student property in a timely manner. After confiscating a skateboard from student B.L. at lunch, you told B.L. he could retrieve the skateboard after school from his administrator. However, you did not turn the skateboard over to administration. Instead, you kept the skateboard in your

classroom. After school, you refused B.L.'s requests for his skateboard, telling him, 'I don't have time for this.' B.L. waited longer, but you still refused to return it, informing B.L. he would have to 'deal with it tomorrow.' You did not return the skateboard until Principal Gonzalo Moraga retrieved it the following morning."

There is no dispute either that Kelley confiscated B.L.'s skateboard or that it was appropriate for him to do so. What *is* disputed is whether Kelley violated school policy by failing to turn the skateboard over to an administrator the same day. As to that issue, Kelley testified that he attempted to give the skateboard to the grade level administrator but was unable to do so: "At the end of the day, I went up to bring the skateboard to [grade level administrator] Mr. Salas.[1] [His office] was locked and a Staff Assistant informed me they were in a school administrative meeting and they would be in there for a while. [¶] So, at that point I brought the skateboard back to my room and I locked it up in a back room for safekeeping." Kelley said he told B.L. that he was sorry that he could not return the skateboard to him, but protocol required that B.L. get it back from Mr. Salas; if Mr. Salas "gets done with the meeting, you can have him call me or come let me know and I'll contact him and then I'll bring it up to him."

B.L. gave a different account of the event. He testified that during a lunch period, Kelley took his skateboard and said B.L. could get it from his counselor after school. B.L. admitted that he was not permitted to have his skateboard with him during lunch. Kelley was "kind of angry, frustrated" during this incident. After school, B.L. went to his grade level administrator, Mr. Salas, and was told he did not have the skateboard. B.L. went back to Kelley's room, but Kelley was on his way to a meeting and said B.L. could come get it later. After the meeting was over, B.L. asked if he could have his skateboard to get home, and Kelley said no, he could have it "later." B.L. walked home; the walk took over an hour. The next day, B.L.'s father came to school and the skateboard was returned.

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[1] In the record and the appellant's opening brief, Mr. Salas is referred to both as a counselor and a grade level administrator. We refer to him as a grade level administrator herein.

Kelley urges there was no substantial evidence he acted improperly because the "uncontroverted evidence" showed he was justified in taking the skateboard and that "[t]he grade level administrator was not available during the school day." In fact, B.L.'s testimony was that the administrator *was* available after school, and that Kelley simply refused to return the skateboard, saying B.L. could get it "later." The trial court was well within its discretion in crediting B.L.'s testimony and disbelieving Kelley's. Thus, the court's finding was supported by substantial evidence.

IV.

Participation Category Incident

The statement of charges alleged: "During the 2011-2012 school year, you added a 'participation' category into student grades. Your 'participation' category was added mostly 'to hurt [students'] grades as punishment for various things[,]' such as arriving late to class."

There is no dispute that Kelley made use of a "point deduction system" to "provide an incentive for students to be in class and to actively participate in the learning process." Under that system, students were "given 150 points each semester, and . . . each [specified] infraction . . . result[ed] in a loss of . . . points." Students could "earn back points by serving a 20 minute detention with the instructor for each 10 point loss due to their behavior in the classroom."

The trial court found this allegation was established, a conclusion we find unsupported by substantial evidence. Although Kelley's policy of using a participation category as part of his grading *was* established, the statement of charges alleged that the policy was a "cause for discipline" of Kelley. The Commission has not cited any evidence suggesting that the participation category policy was a legitimate cause for discipline of Kelley, and Kelley cites evidence to the contrary. Specifically, Kelley relies on the testimony of the school's principal that Kelley's use of a participation category as part of his grading was *not* "a basis on which to take disciplinary action against him." Accordingly, the trial court erred in finding this incident substantiated.

V.

District's Request to Order Kelley's Dismissal

As we have said, the court concluded that taken as a whole, the District established "clear unprofessional conduct," and it ordered the Commission's decision to "be set aside, and remand[ed] the matter to be reconsidered in light of this Court's decision." On appeal, the District urges that this court should not order this matter to be sent back to the Commission, but instead should "exercise its authority to order Kelley's dismissal as the trial court concluded Kelley engaged in clear unprofessional conduct and the District is prejudiced by continuing to provide Kelley his full salary and benefits."

As a general matter, a respondent that has not appealed from the judgment " 'may not urge error on appeal.' (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.)" (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.) Code of Civil Procedure section 906 provides a limited exception " 'to allow a respondent to assert a legal theory which may result in affirmance of the judgment.' " (*In re Estate of Powell*, *supra*, at p. 1439.) That limited exception does not apply here, where the District did not cross appeal from the judgment and its request that we order Kelley's dismissal would result in a partial *reversal*, not a full affirmance, of the judgment. Accordingly, the District's failure to cross-appeal from the judgment granting the petition for writ of mandate precludes us from granting the relief the District seeks.

Moreover, even if the District had cross-appealed from the judgment, we still could not order Kelley's dismissal. "[T]he propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency." (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966.) "Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404; *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500-501.)" (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580.) Accordingly, because the determination of the appropriate penalty is within the discretion

of the Commission, we cannot usurp the Commission's discretion by determining, at the appellate level, the severity of the penalty to be imposed.

DISPOSITION

The judgment granting the petition for writ of mandate is reversed to the extent that it found the participation category incident established, and is otherwise affirmed. Each party shall bear its own appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

HOGUE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.